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No. 86-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BETTY LOU BATEY,

Petitioner,

v.

CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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QUESTIONS PRESENTED

1. Is contempt of court "criminal" in nature for the purposes of the Double Jeopardy Clause when the defendant is given and serves a definite jail sentence with no opportunity to purge the contempt?

2. If a sentence for contempt of court contains punishments of two types—one a definite jail term with no opportunity to purge, the other a fine conditioned on future obedience—criminal in nature for the purposes of the Double Jeopardy Clause?

3. Does the Double Jeopardy Clause bar a criminal prosecution for conduct which has previously been punished as contempt of court?

PARTIES

All parties are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, issued in this proceeding on July 31, 1986.

OPINIONS BELOW

The order of the California Supreme Court denying the petitioner's petition for review of November 20, 1986, appears in the Appendix at 1a. The judgment and opinion of the California Court of Appeal filed July 31, 1986 is reported at 183 Cal.App.3d 1281, 228 Cal.Rptr. 787 (1986) and appears in the Appendix at 2a.

JURISDICTION

The California Supreme Court denied the petitioner's petition for review of the Court of Appeal's decision on

November 20, 1986. The jurisdiction of this Court is invoked under Title 28 of the U.S. Code § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;"

California Penal Code § 278.5(a):

Every person who in violation of the physical custody or visitation provisions of a custody order, judgment, or decree takes, detains, conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both; or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

STATEMENT OF THE CASE

This case arises from a nationally publicized child custody battle between petitioner, Betty Lou Batey, a Pentecostal Christian, and Frank Batey, her former husband who is a self-proclaimed homosexual. On September 7, 1982, the San Diego Superior Court changed custody of their son Brian, then 11 years old, to Frank, who was living with a homosexual partner. Mrs. Batey had been the custodial parent for the previous five years.

Mrs. Batey picked up their son Brian for her first scheduled visitation on September 17, 1982. Instead of returning Brian at the end of the weekend, Mrs. Batey and Brian

fled the state, and did not return for approximately 1 1/2 years.

On April 4, 1983, a felony complaint was filed in the Municipal Court, San Diego Judicial District, and a warrant issued for Mrs. Batey's arrest for two counts of violation of California Penal Code § 278.5. She turned herself in to the authorities in Denver, Colorado, on April 23, 1984. While in Denver, she spent 13 days in jail on the criminal warrant awaiting extradition to California. Mrs. Batey waived extradition and returned voluntarily to California. She was booked into jail, and immediately released upon bond. Brian, the son, returned to California on May 1, 1984.

On July 6, 1984, an information was filed in Superior Court in San Diego. The information charged Mrs. Batey with two counts of child stealing, in violation of California Penal Code § 278.5. This action simply transferred the case from the Municipal Court to the Superior Court in accordance with California procedure.

Meanwhile, on June 21, 1984, Frank obtained an order to show cause for contempt in the domestic action. There were a total of 467 counts of contempt alleged. The maximum penalty for this contempt charge was some 8 and one-half years in jail and a fine of $467,000. Count I actually alleged 464 counts of contempt of court for willfully failing to return Brian to him (one for each day he was gone). Count II alleged that Mrs. Batey made negative remarks about Frank to their son in violation of the court order. Count III charged Mrs. Batey with willfully preventing Brian from participating in therapy, in violation of the court order. Count IV alleged that Mrs. Batey willfully removed Brian in violation of the court order.

In October, 1984, a trial began in the San Diego Superior Court before Judge Judith McConnell involving sev-

eral phases. The first phase was an attack by Mrs. Batey upon the change of custody decree alleging that it had been based on unconstitutional religious discrimination. The decree was affirmed. The second phase of the trial was the contempt of court action. The third phase was an action by Mrs. Batey to change the boy's custody from her former husband back to herself.

The District Attorney handling Mrs. Batey's prosecution sat in court every day of this seven-week trial to screen the evidence coming in so he could use it properly in the upcoming felony trial. He had previously consented to postponing the criminal charges until after this proceeding.

During the contempt phase of the trial, the Superior Court consolidated the 464 daily contempt allegations into one count. Mrs. Batey was found guilty and in contempt for violating the consolidated charge, plus Counts III and IV. Count II was dismissed.

Although the Superior Court found Mrs. Batey in contempt of court, Judge McConnell delayed sentencing until after the felony trial. The stated reason for the delay was that the judge knew that Mrs. Batey's counsel was planning to seek dismissal of the felony charges on Double Jeopardy grounds.

On January 14, 1985, Mrs. Batey's trial on the felony child stealing charges was scheduled to begin before Superior Court Judge Earl Maas. She entered pleas of not guilty, former conviction and once in jeopardy to the felony child stealing allegations. She filed pre-trial motions for dismissal arguing that the Double Jeopardy Clause was violated by this second prosecution since she had been previously found guilty of contempt of court involving the same evidence and the same necessary ele-

ments for conviction. Judge Maas held that trying her on the criminal charges of child stealing would constitute double jeopardy, in violation of the U.S. Constitution.

After the dismissal of criminal charges, Mrs. Batey returned to the other court for sentencing. She was sentenced for contempt of court on February 15, 1985. Judge McConnell imposed a 5 day jail term for each of the 3 counts, for a total of 15 days. Then the court held that under California law she was required to give Mrs. Batey credit for the 13 days she had spent in jail in Denver, plus a 3-day credit for good behavior. This 3 day credit, added to the 13 days Mrs. Batey had already served in jail, made the time she had served one day longer than the penalty imposed by the judge. The judge then determined that she could not order Mrs. Batey to serve any more time in jail. Mrs. Batey was held in Denver in connection with the criminal charges.

Judge McConnell also fined Mrs. Batey $1,000 for each of the 3 counts, for a total of $3,000. The judge stayed the fine for a period of one year, on the condition that Mrs. Batey would comply with all relevant court orders dealing with custody, visitation, etc.

The district attorney appealed the dismissal of the criminal charges. The California Court of Appeal reversed the dismissal on a 2-1 vote, and reinstated the criminal charges. The reversal was predicated upon the notion that the contempt conviction was "civil" and not "criminal" in nature. Mrs. Batey appealed to the California Supreme Court, which declined to hear the case on November 20, 1986. Chief Justice Rose Bird dissented from the refusal to hear the case.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH WERE DECIDED BELOW IN DIRECT CONTRADICTION WITH THE APPLICABLE DECISIONS OF THIS COURT.

This Court has previously dealt with a case which is virtually identical to this one. In *Colombo* v. *New York*, 405 U.S. 9 (1972), a person previously convicted of contempt of court asked this Court to dismiss his criminal charges as a violation of the Double Jeopardy Clause because he had previously been convicted of contempt for the same behavior. The New York Court of Appeals had held that his contempt conviction was civil in nature and thus did not raise a Double Jeopardy problem. This Court declined to answer the broad question of federal constitutional law which defendant had posed, but decided an equally important question under the Double Jeopardy Clause instead. This Court held:

> The judgment of the Court of Appeals must be vacated. The judgment of the New York trial court entered on December 15, 1965, was for "criminal contempt," petitioner was sentenced to a definite term in jail and ordered to pay a fine, and neither the prosecutor nor the trial court considered his offer to testify as sufficient to foreclose execution of the sentence. For the purposes of the Double Jeopardy Clause, petitioner was confined and penalized for criminal contempt of court.

405 U.S., at 10-11.

Thus, this Court made it clear that for the purposes of Double Jeopardy analysis contempt is criminal if: (1) there is a fixed sentence sought or imposed; and (2) there is no opportunity to purge one's contempt by performance of the court's order.

From the outset, Mrs. Batey's contempt trial was criminal in nature. She was charged with wrongfully removing the boy from the state. At the time her contempt trial began, the boy had been returned by her actions for nearly six months. She was tried for the purpose of punishing her past behavior.

She was ultimately sentenced to the maximum penalty possible under California law. The judge held that she was obliged by California statutes to give Mrs. Batey credit for time served while being held in Denver on the fugitive felony warrants. The reason for this was that Judge McConnell held that the contempt charges and the felony charges were indistinguishable. Judge Maas' ruling dismissing the felony charges under the Double Jeopardy Clause was also predicated upon a finding that the charges in the contempt and the felony actions were identical in both evidence and elements.

On remand, the New York Court of Appeals ruled that the prior contempt conviction precluded the criminal indictments against Colombo, because of the applicability of the federal Double Jeopardy Clause. In *People* v. *Colombo*, 31 N.Y.2d 947, 341 N.Y.S.2d 97, 293 N.E.2d 247 (1972), the New York Court of Appeals said,

> Thus, defendant was indicted for the same act and offense for which he previously was punished by Justice Barshay for contempt of court pursuant to section 750 of the Judiciary Law. The same evidence proves the Judiciary Law contempt for which defendant was previously punished and the Penal Law contempt charged in the indictment, and the elements of the two contempt charges are the same. Since the Supreme Court of the United States has held that the defendant's previous punishment for contempt of court pursuant to the Judiciary Law was for "criminal" contempt under the particular facts of this case,

> *Colombo* v. *New York*, 405 U.S. 9, 10-11, 92 S.Ct. 756, 30 L.Ed.2d 762, defendant's subsequent indictment for the same offense under section 600 of the former Penal Law is barred by the double jeopardy clause.

31 N.Y.2d, at 949.

Judge Maas found this Court's decision on *Colombo* to be controlling on the issue of whether the contempt was "civil" or "criminal" in nature. He also found the New York Court of Appeals decision in *Colombo* to be persuasive on the ultimate issue of whether or not a criminal contempt conviction barred prosecution under the Double Jeopardy Clause. Judge Maas also was influenced to dismiss on the authority of a case from another division of the California Court of Appeal which had previously followed *Colombo* as decided by this Court, and as followed on remand by the New York Court of Appeals. That case was *People* v. *Lombardo*, 50 Cal.App.3d 849, 123 Cal.Rptr. 755 (1975). The California Court of Appeal analyzed the case before it in light of *Colombo*, and said,

> Thus, where as here the court order was punitive in nature and the element of both offenses the same, and the same evidence supported both offenses, we conclude that the prosecution under section 166, Penal Code was barred by the double jeopardy clause of the Fifth Amendment of the United States Constitution. [Citations omitted.]

123 Cal.Rptr., at 759.

The division of the California Court of Appeal which heard Mrs. Batey's case abandoned this position and refused to follow *Colombo* on a 2-1 vote. Even though the contempt and the felony charges involved the same evidence and the same elements, and Mrs. Batey had in fact served time in jail for violating the child custody order,

the Court of Appeal did not view this as criminal contempt, but civil contempt. App. at 10a.

The Court of Appeal dodged the double jeopardy issue by mischaracterizing Mrs. Batey's jail sentence, and said she wasn't really punished for contempt:

> The jail sentence on Mrs. Batey was credited against prior confinement. In short, the contempt order gave rise to no actual punishment . . .

App., at 10a.

In another part of its opinion, the Court of Appeal implied that Mrs. Batey's sentence was "suspended" (see Appendix at 12a).

Mrs. Batey served time in jail. The lucid dissent by Judge Lewis ably points out the error of the majority's decision:

> Whether viewed as a whole or otherwise, the disposition of the contempt proceedings included an order that Betty Lou Batey serve 15 days in custody for her failure to comply with prior orders of the court. That custody was not conditional. She could not avoid it by complying with or agreeing to comply with an order of the court. She had been "found guilty" and had served the 15 days. The fact she served it while awaiting her hearing does not change the fact she served the time. It was actual punishment under the order. Characterizing as "civil" a sentence of 15 days in custody for past conduct with no possibility of obtaining a release by complying with orders of the court, in my opinion, contravenes the definition of what is a contempt that is criminal in character. The dignity of the court was being vindicated by that commitment to custody.

App., at 12a.

The Court of Appeal correctly defined criminal contempt as punitive in nature, punishing someone for past behavior. That court correctly defined civil contempt as coercive in nature, trying to compel someone to do something. The Court of Appeal cited with approval this definition from *United States* v. *Asay,* 614 F.2d 655 (9th Cir. 1980):

> Under the sanction test, if the purpose of the relief is to compel the respondent to comply or compensate the petitioner for the refusal, the contempt proceeding is civil in nature. If the purpose is to punish the respondent and vindicate the court, the proceeding is criminal.

614 F.2d, at 659.

It is clear from the record that Mrs. Batey was tried and sentenced to 15 days in jail to punish her for what she had already done: fleeing the state with her son in violation of the custody decree. The judge did not impose the sentence to prevent her from doing something in the future. Even the prosecuting attorney found the contempt to be criminal. During the hearing before Judge Maas, he conceded that the contempt was criminal in nature. He said:

> And I agree with counsel's characterization of that as criminal contempt because the sanction, when someone has violated a court's order is a criminal sanction of five days or a thousand dollars for that violation. It's not the type of contempt where you say bring in the things and they don't—in othe words, the idea of getting somebody to do something, testify when they have immunity, which is a civil contempt, I believe, so it's criminal contempt; I agree with that.

Transcript at 34; App. at 43a.

While conceding that the contempt here was criminal in nature, he argued that under the California Constitution

a contempt conviction did not give rise to a Double Jeopardy violation. Judge Maas held that while California law was different, under the Federal Constitution, a criminal contempt conviction gives rise to Double Jeopardy protection.

In spite of this clear agreement between the parties' counsel that the contempt was criminal, the Court of Appeal found the contempt to be "predominately civil." But Mrs. Batey was tried and punished for what she had done, not what she might do.

Rather than following the applicable federal law as announced by this Court in *Colombo* and by the Ninth Circuit in *Asay*, the California Court of Appeal created its own new standard to judge whether contempt is civil or criminal for the purposes of the federal Double Jeopardy Clause. This new test exalted externals over substance, by pointing out that the contempt must be "civil," since it was brought by a private party, and captioned as a civil case:

> The proceedings were initiated by a private plaintiff, were not prosecuted by the People, and were captioned as a civil proceeding.

App., at 10a.

The California Court of Appeal effectively limits double jeopardy protections by definitional tricks. By defining Mrs. Batey's contempt as "civil," she will be tried again on criminal charges, even though she has been previously tried and served jail time for contempt for the very same actions.

No decision of this Court has lower courts focus on superficial factors such as whether a private party brought the contempt action, and how the court captioned

the case. She was tried for punishment purposes with no opportunity to purge herself of the contempt. She in fact served her time. This is classic criminal contempt.

The Oregon Supreme Court, in a similar case, stoutly refuted the simplistic notion that a private citizen can never initiate criminal contempt. In *State* v. *Thompson*, 294 Ore. 528, 659 P.2d 383 (1983), the Oregon Supreme Court said that "criminal contempt" has nothing to do with who brings the original lawsuit, because the court issues the order that is violated. Contempt is criminal, the Oregon Supreme Court said, "when it is imposed as punishment for a completed contempt that can no longer be avoided by belated compliance," 659 P.2d, at 385.

Courts punish people for contempt, not individuals. A prosecutor or an average citizen can ask a court to find a party in contempt, but the court ultimately decides whether it wields its contempt power or not. This Court should take this case to declare clearly that criminal contempt does trigger double jeopardy protection, even if a private citizen brought the contempt action.

The Court of Appeal found the contempt order to be "predominantly civil." App. at 10a. The court reached the decision because the fine was contingent on Mrs. Batey's future behavior, although the jail sentence was not.

The Court of Appeal ignored the decision of this Court that a contempt proceeding can contain both criminal and civil elements at the same time. *United States* v. *United-Mine Workers*, 330 U.S. 253, 299 (1947). The fact that both civil and criminal sanctions appear in the same contempt order does not "neutralize" the contempt punishment for double jeopardy purposes. Why should the civil part "trump" the criminal contempt portion?

Petitioner respectfully suggests that two other elements in this case override any "partially civil" nature of this particular contempt. In a case such as this, where the contempt is not committed in the presence of the court, the criminal or civil nature of the contempt really should be examined at the point the contempt trial is commenced. It is the commencement of the trial and not the imposition of sentence which triggers the attachment of jeopardy for the purposes of the federal Double Jeopardy Clause, *Serfass* v. *U.S.*, 420 U.S. 377 (1975).

At the beginning of Mrs. Batey's trial for contempt, the boy was back in the court's custody.[1] Severe punishment was sought against Mrs. Batey, over 8 and a half years in jail and a fine of over $467,000. She was being tried for punishment purposes and punishment purposes only. There was nothing further she could do to purge herself and free herself from the contempt. She had already returned the boy. All that there was left to do was to defend herself as best she could to mitigate the ultimate punishment. When counsel succeeded in convincing Judge McConnell that the 464 daily counts of contempt had to be reduced to a single count, the potential amount of punishment was materially reduced, but it did not change the character of the proceedings.

However, if the proper focus is the punishment actually imposed, petitioner would suggest that the presence of *any* criminal sanction invokes application of the Double Jeopardy Clause, for the portion of the order that involves criminal contempt. The fact that a court may have included a civil sanction does nothing to mitigate the constitutional violation when a person is punished twice for the same criminal offense. If the Court of Appeal's

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[1] He was in a court-appointed foster home.

logic is correct, then judges could avoid double jeopardy problems merely by including some civil contempt sanction, along with any criminal sanction. It is clear in this case that Judge McConnell attempted to delay sentencing to avoid any further Double Jeopardy problem. But Judge Maas correctly ignored that issue since jeopardy attaches at the time the contempt trial commenced, not at the point of sentencing.

The California Court of Appeal has forsaken the position decided by this Court in *Colombo*. This Court should reverse this decision upon the clear precedent of *Colombo*. The contempt herein was "criminal" in nature for the purposes of the Double Jeopardy Clause.

II. STATE SUPREME COURTS ARE SPLIT ON WHETHER PRIOR CONTEMPT OF COURT CONVICTIONS TRIGGER DOUBLE JEOPARDY PROTECTION.

We would urge this Court to take this case to not only require the California courts to follow *Colombo*, but also to settle the issue that *Colombo* presented but was not decided. That is the issue of whether a criminal contempt conviction precludes a criminal charge on the same facts, elements and evidence.

The New York Court of Appeals viewed this Court's decision in *Colombo* as an anvil-like hint, and accordingly reached the decision that criminal contempt convictions did prevent a second criminal prosecution because of the federal Double Jeopardy Clause. Other state supreme courts have not been as easily swayed by this Court's *Colombo* decision. It has been received by some state supreme courts, and rejected by others. The state courts of this land need a clearer and more vivid word from this Court on the relation of prior criminal contempt convictions to the Double Jeopardy Clause.

Courts must wrestle increasingly with this criminal contempt-double jeopardy issue because of the growing divorce rate in the United States, and related increase in child custody orders by courts across the land. Spouses split by divorce frequently violate court custody orders by child stealing from the custodial parent. Many states now have laws against this kind of custodial interference.

If a parent violates a custody order, and is punished for criminal contempt of court, the authorities and the courts face an unsettled question: should the parent be criminally tried for violating the child stealing statutes, or does this violate the parent's double jeopardy rights?

Of course, not all of these criminal contempt-double jeopardy cases arise in a divorce-child custody setting, but increasing numbers of these cases do arise in that context. More and more, courts must deal with how double jeopardy protections mesh with criminal contempt. The state supreme courts have divided on their answer to the question, which invites this Court's clarification.

States Where Prior Criminal Contempt Is Not A Double Jeopardy Bar To Subsequent Criminal Prosecution:[2]

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[2] This Court should be aware of two other cases that deal with the contempt-double jeopardy issue, but do not come to a conclusion on the question:

California—*People* v. *Derner*, 182 Cal.App.3d 588, 227 Cal. Rptr. 344 (1986). A man was found in contempt of court for detaining, retaining and concealing his four-year-old daughter in violation of the custody decree. He was fined $1,000 and sentenced to 5 days in jail, but the judge suspended the penalties for one year, dependent on whether he did not violate any law or family law court order during that time. The California Court of Appeal found the contempt to be "civil," because the penalties were stayed dependent on future behavior.

Maine—*State* v. *Hanson*, 483 A.2d 723 (Me. 1984)

A mother took her 8-year-old son from the custodial father in

Michigan—*People* v. *McCartney*, 367 N.W.2d 865 (Mich.App. 1985).

In *McCartney*, the Michigan Court of Appeals reversed itself, and ruled that a prior criminal contempt punishment did not bar future prosecution. At first, the Michigan Court of Appeals ruled that the criminal prosecution violated the defendant's double jeopardy rights, but that opinion was vacated and remanded by the Michigan Supreme Court. One gets the flavor that the Court of Appeals reluctantly reversed its decision on orders of the state Supreme Court. Although the defendant was sentenced to 20 days in jail or pay $1700 for embezzling contrary to a court order, she could still be criminally prosecuted. The Court of Appeals stood by its ruling that the contempt was criminal, but said the criminal prosecution presented no double jeopardy violation. The Michigan Court of Appeals did not even mention this Court's decision in *Colombo*.

New Jersey—*State* v. *Warren*, *State* v. *Sayles*, 186 N.J.Super. 35, 451 A.2d 197 (1982). Two men refused to testify as witnesses in two unrelated murder trials. They each served 6 months in jail for contempt of court. Later, the grand jury returned separate indictments against them, charging them with hindering the prosecution of another. The New Jersey Court ruled that a person

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violation of the custody provision of a divorce decree. The trial court ordered the mother to appear and show cause why she should not be held in contempt of court. The mother alleged that the hearing was criminal in nature, although the judge did not find her in contempt. She was later prosecuted for criminal restraint of child under Maine law. The Maine Supreme Court ruled that because of the scanty record, it would not rule on whether criminal contempt could properly be the basis for a double jeopardy claim. The court allowed the prosecution to go forward.

punished for criminal contempt of court could also be prosecuted for violating the state's criminal laws:

> These considerations compel the conclusion that an act which is a contempt of court and also a crime may be punished both by summary proceedings and by subsequent indictment and conviction. Conduct destructive of the court's decorum can also be an offense against the laws of the State.

451 A.2d, at 200.

The New Jersey Court said the contempt conviction did not trigger double jeopardy protection because of its "swift imposition," *Id.* The New Jersey Court cited a number of this Court's decisions to back up its legal conclusion, but curiously neglected to mention *Colombo*, which had almost identical facts. The New Jersey Court obviously did not follow the direction of this Court expressed in *Colombo*.

Tennessee—*Maples* v. *State*, 565 S.W.2d 202 (Tenn. 1978).

The defendant brought fraudulent divorce proceedings and gave false testimony to the court in those proceedings. He was fined $50 for contempt of court. Later, he was charged with perjury, and the defendant claimed the prosecution was barred by the Double Jeopardy Clause. The Tennessee Supreme Court allowed the prosecution to go forward, ruling that the elements necessary to show contempt of court for false filings and testimony was different than the elements for perjury. The Tennessee Supreme Court explicitly rejected the application of this Court's decision in *Colombo* to their case. 565 S.W.2d, at 205.

The Chief Justice dissented, saying that *Colombo* controls the case at hand. The Chief Justice could see no

meaningful distinction between the contempt and perjury:

> The evidence and the elements are precisely the same. To prove the criminal contempt, perjury must be established. To prove the perjury, perjury must be established. No additional fact is necessary to either proof. The fact that it violated two separate statutes is of no significance.

565 S.W.2d, at 208.

The Chief Justice of the Tennessee Supreme Court saw this Court's decision in *Colombo* as relevant precedent, that compels a ruling in favor of the defendant's double jeopardy rights. The majority of the Tennessee Supreme Court failed to discern the directions of this Court found in *Colombo*.

States Where Prior Criminal Contempt Bars Subsequent Criminal Prosecution Because Of The Double Jeopardy Clause:

Florida—*Yarbo* v. *State*, 402 So.2d 599 (Fla.App. 1981).

The defendant served 179 days in jail for contempt of court, because he filed a divorce petition stating that he had no children, when he actually had two chidren. The state later filed charges against the defendant for perjury. The Florida Court of Appeals found the defendant protected by the Double Jeopardy Clause, because the elements needed to prove the contempt were identical to those needed to prove perjury under the criminal statutes. This case is similar to the Tennessee case cited above, *Maples* v. *State*, but the Florida court reached the opposite conclusion that the Tennessee court found.

Illinois—*People* v. *Gray*, 69 Ill.2d 44, 12 Ill.Dec. 886, 370 N.E.2d 797 (1977).

The defendant struck his wife and shot her with a gun. This violated a protective order in a divorce proceeding. The husband served 6 months in jail for contempt of court. He was later indicted for aggravated battery and attempted murder, under Illinois law. His motion to dismiss on double jeopardy grounds was denied, and he was convicted and sentenced to 1 to 3 years. Both the Illinois Court of Appeals and the Illinois Supreme Court said the criminal prosecution violated the defendant's double jeopardy rights. The Illinois Supreme Court said that the defendant was being punished twice for the same acts.

Louisiana—*State* v. *Hope*, 449 So.2d 633 (La.App. 1984).

The defendant took his 3-year-old daughter from the custodial mother, but took her out of state for 5 months in violation of the custody decree. The court found the defendant in contempt of court, and he served 10 days in jail. Later, he was charged with simple kidnapping.

The Louisiana Court of Appeals found that the contempt was criminal. The court also found that the evidence needed to convict the defendant of kidnapping was the same evidence for proving contempt of court. Therefore, the criminal prosecution violated his double jeopardy rights.

Oregon—*State* v. *Thompson*, 294 Or. 528, 659 P.2d 383 (1983).

The defendant entered a neighbor's land, although he was enjoined from doing so in a property dispute. He was indicted for criminal trespass, but was convicted and fined for contempt of court while the charges were pending.

The Oregon Supreme Court cited this Court's decision in *Colombo* as precedent for their case. The Oregon Supreme Court ruled that a subsequent prosecution for

criminal trespass violates the Double Jeopardy Clause, when the defendant has earlier been punished for criminal contempt of court.

CONCLUSION

The California Court of Appeal denied double jeopardy relief to Betty Batey by erroneously finding that the contempt conviction was civil in nature in direct contradiction with this Court's decision in *Colombo*. The writ should be granted to reverse this obvious error. This Court should grant the petition for a writ of certiorari for the additional need to enunciate clearly the principles discussed but not decided in *Colombo*.

January 19, 1987

Respectfully submitted,

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APPENDIX

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D002900

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, *Appellant*,

v.

BETTY LOU BATEY, *Respondent*.

RESPONDENT'S PETITION FOR REVIEW DENIED.

Bird, C.J., is of the opinion the petition should be granted.

Supreme Court
FILED
Nov 20 1986

/s/ Bird

Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

D002900

(Super. Ct. No. CR69082)

THE PEOPLE, *Plaintiff* and *Appellant*,

v.

BETTY LOU BATEY, *Defendant* and *Respondent*.

FILED
Jul 31 1986

Court of Appeal Fourth District

APPEAL from an order of the Superior Court of San Diego County, Earl J. Mass, Jr., Judge. Reversed

The People appeal an order of the superior court dismissing felony child stealing charges against Betty Lou Batey on the ground a factually related contempt judgment against her in a domestic case placed her once in jeopardy. We find the contempt order to be coercive and civil rather than punitive and criminal. Accordingly, the constitutional prohibition against double jeopardy has not been violated and the order appealed from must be reversed.

FACTUAL AND PROCEDURAL HISTORY[1]

On September 7, 1982, the San Diego County Superior Court awarded custody of then 11-year-old Brian to his father Frank with specified visitation rights to Brian's mother, Betty. In accordance with the court's order, Betty picked up Brian from his father for her first scheduled visit on September 17, 1982. She was to return Brian to Frank on September 19, 1982. She did not do so but instead removed Brian from California. Frank next saw Brian April 30, 1984, at a Denver, Colorado crisis center. On May 1, 1984, Brian was returned to California and lodges with a foster family awaiting resolution of the custody proceedings between his parents.

On June 21, 1984, Frank obtained an order to show cause for contempt in the domestic action. Count I charged Betty with 464 instances of willfully failing to return Brian to him in violation of the September 7, 1982, court order (one for each day the child was retained from September 20, 1982 to May 1, 1984). Count II alleged Betty made disparaging remarks about Frank in violation of the court's order. Count III charged Betty willfully prevented Brian from participating in therapy in violation of the court's order and Count IV alleged Betty willfully removed Brian from California in violation of a court order.

On July 6, 1984, an information was filed charging Betty with two counts of child stealing in violation of Penal Code section 278.5, subdivision (a). Count one alleged "[o]n or about September 20, 1982, BETTY LOU BATEY did willfully, unlawfully and in violation of a custody decree, retain a child after the expiration of a visitation period, with the intent to deprive the legal custodian of such child of the right to custody, in violation of Penal Code section 278.5(a)." Count two charged "[b]etween September 20, 1982, and April 23, 1984, BETTY

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[1] We draw the facts from the record of this criminal case, including the transcript of preliminary hearing, and from the San Diego County Superior Court file in *In re Marriage of Batey*, D162395, which we judicially notice.

LOU BATEY did willfully, unlawfully, and in violation of a custody decree conceal a child from his legal custodian with the intent to deprive the other person of such right to custody, in violation of Penal Code section 278.5(a)."

On October 17, 1984, the family court consolidated the 464 "daily" contempt allegations into one count. Betty was found guilty of the consolidated charge and of Counts III and IV. Count II was dismissed. The court imposed 5 days consecutive custody for each charge found true with credit for 16 days custody spent in Colorado. The court's minutes further state "The Court also fines the respondent $1,000. on each of the 3 counts making a total of $3,000. *Execution of the fine is stayed for a period of one year on the condition that the respondent comply with all court orders regarding visitation, custody, education of minor, therapy and disparaging remarks order.*" (Emphasis added.)

Betty entered pleas of not guilty, former conviction, and once in jeopardy to the felony child stealing allegations. On Betty's motion, the court found the contempt conviction for the consolidated count constituted former jeopardy and dismissed the information against her. The People appeal. We reverse.

DISCUSSION

"The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth, provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" (*Brown* v. *Ohio* (1977) 432 U.S. 161, 164.)

Being in jeopardy in the constitutional sense means risking the punitive consequences normally incident to proceedings which are essentially criminal. (*Breed* v. *Jones* (1975) 421 U.S. 519, 528.) Being twice in jeopardy for the "same offense"[2]

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[2] "The same" does not mean identical. The constitutional question is "whether each provision requires proof of an additional fact which the other does not. . . ." (*Blockburger* v. *United States* (1932) 284 U.S. 299, 304.) The fact that one offense may require proof of an additional element the other does not will not destroy constitutional identity. (*Brown* v. *Ohio, supra*, 432 U.S. at p. 168.)

requires that the elements of the compared offenses be the same and that the same evidence support proof of both. (*People* v. *Lombardo* (1975) 50 Cal.App.3d 849, 854; *Benton* v. *Maryland* (1969) 395 U.S. 784, 794.)

The People do not question the presence of the latter two criteria but argue only that the contempt proceedings attending the domestic case here were civil rather than criminal.[3] We agree.

State and federal case law clearly distinguish criminal and civil contempts. "[W]here the object of the proceedings is to vindicate the dignity or authority of the court, they are regarded as criminal in character even though they arise from, or are ancillary to, a civil action. [Citation.]" (*Morelli* v. *Superior Court* (1969) 1 Cal.3d 328, 333.) ". . . [C]ivil contempt, as contrasted with criminal contempt, has traditionally been viewed as non-punitive, for its purpose is only to compel compliance with a lawful order of the court; . . ." (*In re Lifschutz* (1970) 2 Cal.3d 415, 439, fn. 27.) Federal law is to the same effect. "Under the sanction test if the purpose of the relief is to compel the respondent to comply or compensate the petitioner for the refusal, the contempt proceeding is civil in nature. If the purpose is to punish the respondent and vindicate the court, the proceeding is criminal." (*United States* v. *Asay* (9th Cir. 1980) 614 F.2d 655, 659.)

Respondent argues the contempt proceedings in the family court matter here were clearly aimed at vindicating the court and punishing past conduct rather than compelling compliance in the future or compensating a private litigant. Respondent points out Betty was sentenced to a flat fifteen days in custody, the maximum possible for three counts of contempt (Code Civ. Proc., § 1218), with no option given her to avoid the sanction through future conduct. Respondent concludes that under controlling law, these contempt proceedings were criminal.

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[3] In light of the People's argument and our disposition, we do not reach the question whether the two offenses are the same.

However, respondent's reading focuses on only a portion of the court's disposition. Viewed as a whole, the court imposed no present custody at all and stayed payment of any fine for one year conditioned upon respondent's complying with various family court orders. It is this entire disposition which we consider to determine whether the proceedings were essentially civil or criminal.

Colombo v. *New York* (1972) 405 U.S. 9 and the cases it relies upon aid to resolve the question.

Colombo refused to testify before a New York Grand Jury, was found in contempt, sentenced to 30 days and fined $250. His subsequent offer to testify was refused and he served his sentence and paid the fine. He was then indicted "'for his contumacious and unlawful refusal, after being duly sworn as a witness, to answer legal and proper interrogatories.'" (*Colombo* v. *New York*, *supra*, at p. 10.) The trial court dismissed the indictment on double jeopardy grounds. An intermediate Court of Appeal reversed and the New York Court of Appeal affirmed the reversal on two grounds: there were, on these facts, two separate acts of contempt and Colombo's commitment was for civil rather than criminal contempt.

The Supreme Court vacated the judgment of the New York Court of Appeal stating

> "The judgment of the New York trial court entered on December 15, 1965, was for 'criminal contempt,' petitioner was sentenced to a definite term in jail and ordered to pay a fine, and neither the prosecutor nor the trial court considered his offer to testify as sufficient to foreclose execution of the sentence. For purposes of the Double Jeopardy Clause, petitioner was confined and penalized for criminal contempt. *Yates* v. *United States*, 355 U.S. 66 (1957); see also *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Shillitani* v. *United States*, 384 U.S. 364 (1966); *Oriel* v. *Russell*, 278 U.S. 358 (1929)." (*Colombo* v. *New York*, *supra*, at pp. 10-11.)

In *Yates*, the issue was whether the petitioner could be sentenced to prison *after* termination of the trial based on a

contempt finding arising from her refusal to answer questions during the trial. The petitioner argued the prison sentences were imposed to coerce her into answering the questions instead of to punish her, were thus civil rather than criminal contempt, and she could not therefore be properly imprisoned after the trial. (*Yates* v. *United States* (1957) 355 U.S. 66, 71.) When the District Court imposed the sentences, it stated if she answered the questions within 60 days, while it had authority to modify the sentence under Rule 35 of the Federal Rules of Criminal Procedure, it would be inclined to accept her submission to the authority of the court. (The petitioner persisted in her refusal.) (*Id.* at p. 70.)

The United States Supreme Court held the contempts were criminal, stating:

> "We do not believe that the sentences under review in this case were imposed for the purpose of coercing answers to the 11 questions. *Rather, the record clearly shows that the order was made to 'vindicate the authority of the court' by punishing petitioner's 'defiance' thereof.* The sentencing judge did express the hope that petitioner would still 'purge herself to the extent that she bows to the authority of the court' by answering the questions either at the time of the sentencing or within 60 days thereafter. In doing so, however, he acted pursuant to the power of the court under Rule 35 of the Federal Rules of Criminal Procedure rather than under any theory of civil contempt. Indeed, in express negation of the latter idea, he stated that should she answer the questions, '[i]t could have no effect upon this proceeding and need not be accepted as a purge, because of the fact that the time has passed * * * for the administration of justice in this case to be affected by it.'" (*Yates* v. *United States*, *supra*, 355 U.S. at p. 72, fn. omitted italics added.)

In *Cheff*, the petitioner, Cheff, argued his contempt, arising from a Federal Trade Commission proceeding, was civil rather than criminal, and he was wrongfully denied a jury trial at the contempt hearing. (*Cheff* v. *Schnackenberg* (1966) 384 U.S. 373, 376-377.) The United States Supreme Court (although noting the issue was irrelevant since a jury trial is not required

in civil contempt proceedings) held the contempt was criminal since the purpose of the proceedings was not remedial. *Cheff*, a former officer of the corporation which had violated the court's order (ordering compliance with an FTC order), had severed all connections with the corporation long before the contempt proceedings were initiated against him, and the corporation had withdrawn from the area of business involved in the FTC violation. Thus, there was an "*absence of any necessity of assuring future compliance*' which made the six-month sentence 'entirely punitive.'" (*Id.* at p. 377, italics added.)

In contrast, in the companion case to *Cheff*, *Shillitani* v. *United States* (1966) 384 U.S. 364, the United States Supreme Court found a contempt arising from refusals to answer questions before a grand jury trial). *Shillitani* had been given a conditional sentence; i.e., his two year sentence would be terminated before its expiration should he answer the questions or should the grand jury be discharged, whichever may occur first. (*Id.* at pp. 365, 366.) The United States Supreme Court relied on the following factors in finding the contempt civil (1) the act of disobedience consisted of refusing to do what had been ordered, not in doing what had been prohibited; (2) The conditional imprisonment was for the obvious purpose of compelling the witness to testify, thus essentially a civil remedy designed for the benefit of other parties; (3) the fact the courts below called it "criminal contempt" is not determinative, since it "'. . . is not the fact of punishment but rather its character and purpose that often serve to distinguish' civil from criminal contempt. [Citation.] . . ." (*id.* at p. 369); (4) the sentences were intended to operate in a prospective manner, to coerce rather than punish, and concluding "[w]hile any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's wilingness to testify. [Citation.] The test may be stated as: what does the court primarily seek to accomplish by imposing sentence? Here the purpose was to obtain answers to the questions for the grand jury." (*Id.* at p. 370, fn. omitted.)

Finally, in *Oriel* v. *Russell*, *supra*, 278 U.S. at pages 363-364, the United States Supreme Court, relying on *Gompers* v. *Buck's Stove & R. Co.* (1911) 221 U.S. 418, 442, concludes proof beyond a reasonable doubt is not necessary in a contempt order committing the petitioners to jail until they turned over books ordered in a bankruptcy proceeding, since it was a civil contempt, stating: "While in a sense they are punitive, they are not mere punishment—they are administrative but coercive, and intended to compel, against the reluctance of the bankrupt, performance by him of his lawful duty." (*Oriel* v. *Russell*, *supra*, at p. 363.)

The following guidelines emerge from the United States Supreme Court cases. A criminal-punitive contempt order is one which imposes punishment even though the offender offers to purge himself of the contempt, or even though future compliance with the order is no longer necessary. In contrast, a civil-coercive contempt order is one which, although it may have punitive aspects, has as its main purpose the coercion of compliance with the court's order.

Several additional factors evaluated in other cases in various contempts provide useful guidelines here, including the following:

(1) Whether the contempt proceeding is docketed as criminal and tried by the state, rather than docketed as civil and pursued by a private party (*Gompers* v. *Bucks Stove & R. Co.*, *supra*, 221 U.S. 418 [31 S.Ct. 492, 599]; *In re Stewart* (5th Cir. 1978) 571 F.2d 958, 963-964; *Latrobe Steel Co.* v. *United Steelworkers, Inc.* (3d Cir. 1976) 545 F.2d 1336, 1345, compare *State* v. *Thompson* (Ore. 1983) 659 P.2d 383, 387).

(2) Whether the contempt orders punishment which is absolute (i.e., regardless of compliance) or conditional (i.e., suspended if the contemnor complies with the order).(*In re Stewart*, *supra*, 571 F.2d at p. 964: an unconditional fine; *Latrobe Steel Co.* v. *United Steelworkers, Inc.*, *supra*, 545 F.2d at p. 1343.)

(3) Whether the main purpose of the court order is to benefit the plaintiff by providing disincentives to the contemnor to continue defiance of the court's order. (*Latrobe Steel Co.* v. *United Steelworkers, Inc., supra*, at p. 1344.)

(4) Whether the circumstances indicate the private party plaintiff was seeking remedial relief to compel future compliance. (*Shakman* v. *Democratic Organization of Cook Cty.* (7th Cir. 1976) 533 F.2d 344, 350, cert. den. 429 U.S. 858.)

Here, Mr. Batey initiated contempt proceedings under Code of Civil Procedure section 1209, et seq. in the family law action for failure to return the child as required by the custody visitation order. The Code of Civil Procedure contempt proceedings resulted in a finding of three counts of contempt, three $1,000 fines which were suspended upon condition Mrs. Batey comply with family court orders for one year, and a 15 day jail sentence for which credit was given for 16 days served in Denver, Colorado following her arrest.

Applying the above principles to these facts, the contempt order is predominately civil. The proceedings were initiated by a private plaintiff, were not prosecuted by the People, and were captioned as a civil proceeding. The fine imposed was conditioned upon future non-compliance and served primarily to benefit Mr. Batey by giving Mrs. Batey an incentive not to again violate the court's order. Significantly, the fines' suspension was not expressed in language usual to criminal probationary suspensions; that defendant remain generally law-abiding.

The jail sentence imposed on Mrs. Batey was credited against prior confinement. In short, the contempt order gave rise to no actual punishment, and its terms indicate a design to ensure future compliance by Mrs. Batey which will benefit Mr. Batey. Accordingly, the proceedings were essentially civil, not criminal, and should not be a double jeopardy bar to a Penal Code section 278.5, subdivision (a) proceeding.

The very recent decision *People* v. *Derner* (June 18, 1986, No. B015163) ____ Cal.App.3d ____ (review filed July 22, 1986)

[86 L.A. Daily J. D.A.R. 2115] supports this conclusion. There defendant violated a family court custody order, was found in contempt and sentenced to 5 days custody and a $1,000 fine.

The trial court suspended execution of the custody and fine stating defendant was to "'[v]iolate no laws for one year. You are not to violate any other court orders in this file for a period of one year.'" (*People* v. *Derner, supra,* ____ Cal.App.3d at p. ____ [86 L.A. Daily J. D.A.R. at p. 2116].) The Court of Appeal found "enough in [this] statement" to show that "at least the primary part" of the trial judge's order was coercive and concluded "the contempt proceeding against appellant was civil in nature and did not invoke the jeopardy provisions of the United States or California Constitutions" so as to bar a prosecution for violation of Penal Code section 278.5. (*Ibid.*)

If anything the facts of this case more strongly support the conclusion the proceedings were civil since the trial judge's order here was stated wholly in terms of complying with the family court's order and did not contain the mixed probationary and civil-coercive language of *Derner.*

People v. *Lombardo, supra,* 50 Cal.App.3d 849, relied upon by respondent, does not require a different result. Lombardo refused to answer questions put to him at another's preliminary hearing, was found in contempt and sentenced to five days custody and a $300 fine. He was later charged with a criminal violation of Penal Code section 166 for the same conduct, found guilty and sentenced to six months in jail and a fine of $500 with credit for the custody served and fine previously paid. The Court of Appeal reversed holding Lombardo's plea of once in jeopardy should have prevailed. The court noted the object of the contempt proceedings was criminal since it vinciated the authority of the court and punished past conduct rather than coerced future compliance. Following *Colombo* v. *New York, supra,* the Court of Appeal concluded a second prosecution against Lombardo was barred by the Double Jeopardy Clause of the Fifth Amendment.

In contrast to this case, neither the custody nor fine in *Lombardo* were suspended and both proceedings were brought by the public prosecutor. There was nothing from which a court could conclude the contempt proceedings were other than criminal and punitive.

DISPOSITION

We find the contempt proceedings were civil rather than criminal in nature and pose no double jeopardy bar to prosecution for Penal Code violations arising from the same conduct.

The order of the trial court dismissing the information against respondent is reversed.

/s/_____
KREMER, P.J.

I CONCUR:

/s/_____
WORK, J.

I respectfully dissent. Whether viewed as a whole or otherwise, the disposition of the contempt proceedings included an order that Betty Lou Batey serve 15 days in custody for her failure to comply with prior orders of the court. That custody was not conditional. She could not avoid it by complying with or agreeing to comply with an order of the court. She had been "found guilty" and had served 15 days. The fact she served it while awaiting her hearing does not change the fact she served the time. It was actual punishment under the order. Characterizing as "civil" a sentence of 15 days in custody for past conduct with no possibility of obtaining a release by complying with the orders of the court, in my opinion, contravenes the definition of what is a contempt that is criminal in character. The dignity or authority of the court was being vindicated by that commitment to custody. (See *Morelli* v. *Superior Court* (1969) 1 Cal.3d 328, 333.) The fact Batey also received fines which she could avoid by future compliance with the orders does not change the fact she had to serve her 15 days. Batey's

service of time, the most onerous aspect of the contempt order, brings her case into the ambit of *People* v. *Lombardo* (1975) 50 Cal.App.3d 849, which would bar the later prosecution because the contempt order was punitive. For purposes of double jeopardy, it is of minimal relative significance that Batey was left with the ability to avoid payment of the fines by means of future compliance with court orders, whereas Lombardo did not because he had already paid the fine. As I read *Lombardo*, the fact the fine was paid, as an additive to the jail time, played no particularly important role in the court's analysis. The fact the trial court's contempt order "was punitive in nature" (50 Cal.App.3d at p. 854) furnished the foundation for the decision.

In my opinion it is inconsequential that the portion of the contempt order constituting the fine could be viewed as suspended or as coercive only, since I believe that when it is considered along with the jail order actually served, it also fulfilled a primary purpose which is both punitive and deterrent. (See *Yates* v. *United States* (1957) 355 U.S. 66, 75 [78 S.Ct. 128], "The civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent.")

The trial judge correctly analyzed the sentence to custody as punitive and correctly applied the law of double jeopardy. The order of the trial court should be affirmed.

/s/_____

LEWIS, J.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

COURT OF APPEAL NO. D002900

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

BETTY LOU BATEY,
Defendant and Appellant.

From: San Diego County
Hon. Earl H. Maas, Jr., Judge

REPORTER'S TRANSCRIPT ON APPEAL

JANUARY 14, 1985

Appearances:

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For The Defendant And Appellant:	Inpropria Persona

Patricia R. Friend, CSR No. 2494
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IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

Department No. 28 Hon. Earl H. Maas, Jr., Judge

CR 69082

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

BETTY LOU BATEY,
Defendant.

REPORTER'S TRANSCRIPT

JANUARY 14, 1985

Appearances:

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[1]SAN DIEGO, CALIFORNIA, MONDAY, JANUARY 14, 1985, 9:44 A. M.

THE CLERK: In the case of the People versus Betty Lou Batey, case number CR 69082.

MR. MC MANUS: Good morning, your honor, Hugh Mc Manus for the People.

MR. FARRIS: Your honor, Michael Farris for defendant Betty Batey. Mrs. Batey is present in court.

THE COURT: Mr. Farris, are you an attorney licensed to practice in the State of California?

MR. FARRIS: No, I am not. That's why Mr. Smith is here with me. We would ask that I be admitted pro hac vice in this case. I am counsel of record in the custody matter, but pro hac vice with a different local counsel.

THE COURT: I have no problem with that. People have any problem?

MR. MC MANUS: No, your honor.

THE COURT: Counsel, you are Mr. Smith?

MR. SMITH: That's correct.

THE COURT: J. Michael Smith from Los Angeles?

MR. SMITH: Yes, sir.

THE COURT: I have no quarrel with that situation if it's agreeable with Mrs. Batey.

DEFENDANT BATEY: Yes.

THE COURT: You wish this gentleman to represent you; is that correct, ma'am?

DEFENDANT BATEY: Yes.

[2] THE COURT: You will be allowed to represent her in this case. I don't know that there is anything further I have to

do. I haven't had any of these pro hac vices for some time; is that it?

MR. SMITH: That's it.

THE COURT: Usually I see counsel in chambers, but I decided I would do this one in open court in case anyone was interested and do it on the record.

Can you tell me how long it will take to try the lawsuit?

MR. FARRIS: Your honor, if it goes the full length, we would—

THE COURT: Let's assume it goes to a jury trial. What I am trying to do is—

MR. FARRIS: Five to six days, your honor.

MR. MC MANUS: Your honor, I can't give an estimate because I think the court's determination of motions are going to determine what the defense is or what kind of case the prosecution puts on, how long jury selection is going to take.

THE COURT: I didn't know whether it was going to be six weeks or a week. I just wanted a ballpark figure. I'm not going to call for any jury at this time.

Don't call for a jury panel.

THE CLERK: Yes, your honor.

THE COURT: I've come to the conclusion that all pretrial motions should be disposed of because we even call for a panel, if there are such matters we will take care of [3] them.

So, let's just say one week at this time.

MR. FARRIS: Your honor, I would indicate that the maximum, that would be the maximum under any circumstances. It would not be—

THE COURT: I don't know if you are familiar with the schedule but at 9:00 o'clock in the morning, I do sentences, and usually that will mean because of the length of time we are

required now to spend listening to a irrelevant material because of the determinant sentence law, it usually takes an hour to do what you can do in five minutes ten years ago.

And in the afternoon at 4:00 o'clock, I have to hear revocations, motions, et cetera, on ongoing cases just like the other judges. Basically, my hours would be from 9:30 to 10:00 in the morning and until noon, and then from 2:00 until 4:00, so you would get probably four to four and a half hours. I found that that's about all you can expect a jury to comprehend in most cases anyway.

MR. FARRIS: That's fine.

MR. MC MANUS: What about Friday? Are you dark on Friday for criminal?

THE COURT: No, I'm light all the time but insofar as—I can't tell. Like this Friday I apparently do not have any criminal motions scheduled, but I recognize that counsel have gotten used to the idea that they would like to be in their offices on Friday because of the tremendous number of clients they have to see, et cetera. And I will accommodate you there. I can work—I've always got plenty to do.

[4] MR. FARRIS: We would prefer to go straight through.

THE COURT: Well, you're from—

MR. FARRIS: I'm from Washington, D.C.

MR. SMITH: Yes, sir.

THE COURT: So, you're down here and would like to get it over with so you don't have to go back to your offices?

MR. FARRIS: That's right.

THE COURT: All right. We'll work this Friday. I will just tell you that now.

I will want, before we start the trial, a typed list of the possible witnesses that the people intend to call. If counsel for the defense wish to give me such a list, they may. My only

function is I read the list to the jurors to make sure that we don't end up with somebody that's related to somebody, or has some knowledge of the lawsuit other than what they might have read that might affect their deliberations at some point in time.

If and when we get to a full jury trial, how many alternates do you think we would need?

MR. MC MANUS: Maybe two would be safe.

THE COURT: In a one-week case, I know this case has gotten some publicity, and therefore, so that anything comes up we have to get rid of the—some of the jurors, I will use three unless there is some objection.

MR. SMITH: No objection.

MR. FARRIS: No objection.

MR. MC MANUS: No objection.

THE COURT: Insofar as calling an alternate, we put [5] all three names into the hat and they will take the place of the twelve jurors. Is that agreeable?

MR. MC MANUS: Yes.

MR. FARRIS: Yes.

THE COURT: All right.

I haven't seen the pleadings, so I don't know. Are there any further amendments to the pleadings contemplated?

MR. MC MANUS: No, your honor.

THE COURT: We have an amended information charging two counts; is that correct?

MR. MC MANUS: That's correct.

THE COURT: Count one charges a violation of P.C. Section 278.5(A); is that correct?

MR. MC MANUS: Yes, your honor.

THE COURT: And an allegation that the child was taken out of the county.

What effect does that have on it?

MR. MC MANUS: Well, it's got to be a problem prior, I can't remember if it was at prelim or motions.

THE COURT: There is something about 995 granted on 9-11-84, and some initials that crosses out some part of it.

MR. MC MANUS: I think that's what happened.

THE COURT: But is there still some allegation as further alleged that the minor child was taken from the county of San Diego?

MR. MC MANUS: It still reads, from my understanding it still reads, "and it is further alleged that the minor child was taken from the County of San Diego."

[6] THE COURT: In both counts one and two?

MR. MC MANUS: Both counts but that the rest of the allegations have been stricken.

THE COURT: Does count two charge the same offense?

MR. FARRIS: It's our contention that it does.

MR. MC MANUS: The difference is that it covers a time period. There was a time of some nineteen months that they were gone, and that the statute was changed several times since then, the way it's worded.

MR. FARRIS: Your honor, it's our contention that the—

THE COURT: Okay, well, there is legal argument with regard to that. We'll get to that in a minute. I'm just trying to figure out what this thing is about.

Has discovery been completed, counsel?

MR. FARRIS: Yes, your honor.

THE COURT: All right. No priors or anything of that nature?

MR. MC MANUS: *No, your honor.*

THE COURT: Anything of that nature in this case?

MR. MC MANUS: Your honor—

THE COURT: On voir dire, I have rules, but frankly, I have just thrown them away because I've come to the conclusion that based on the philosophy in the state of California, if you're intelligent and smart, you can ask anything you want and there is nothing I can do about it. So, you can spend all the time you want. This is the kind of a case where I believe that voir dire is extremely beneficial to counsel. Most of the cases I get the feeling that counsel are afraid [7] to sit down and start the trial and, of course, the D.A. never objects because he feels he's smarter than the defense counsel.

Be that as it may, the publicity situation is such that it will create some voir dire questioning for you.

MR. FARRIS: Your honor, we would ask that the voir dire take place in camera. Each individual be selected individually because some jurors may have read the publicities and others may not. We would ask that they not be tainted.

THE COURT: Let me suggest this to you, what I plan to do is to get as many people in this courtroom as I can, prospective jurors, then I will read them a statement to be worked out between us of the nature of the case. Then I intend to ask all of the prospective jurors if they heard of the case. I have a hunch in this case we're going to get a lot of hands. For every person that has heard of it, we'll talk to them individually so that they, quote, do not taint the rest of the panel, otherwise we might never get a jury panel.

I want to get a panel before we do anything else by way of voir dire that is completely neutral insofar as your client and this lawsuit is concerned, insofar as what they may have heard from the news media.

Let me ask you, just the little bit I know about this case, and, frankly, I don't—follow these things too carefully. I read what

the appellate court has to say about me, I don't have time to read the newspapers about other judges and other cases. But I know there may be a civil contempt coming out of the domestic area. I know that—

[8] MR. FARRIS: Yes, your honor.

THE COURT: —your client, I gather the fact that the child was with her in what I've read may or—I don't think it's too big a problem, I don't know what your evidence will be, but the husband and father, now ex-husband, I gather; is that correct? They are divorced?

MR. FARRIS: Yes, your honor.

THE COURT: Is alleged to be a homosexual, and your client is alleged to have strong religious feelings, I gather.

MR. FARRIS: Right.

THE COURT: Would be the best way to put what I read.

MR. FARRIS: Yes.

THE COURT: So, do you feel from those two items that—and in addition to publicity, that there are certain items of voir dire that you want to conduct individually outside the presence of other prospective jurors?

MR. FARRIS: Your honor, that's true. I think normally people are not questioned as to their feelings of homosexuality or religion in the scope of a normal criminal voir dire. And it's somewhat more personal than the normal case. Therefore, we would ask that all voir dire be individual because they are going to have to be telling us things that are extremely personal in nature, and reluctant to open up if there is a whole courtroom of jurors listening.

THE COURT: What is the people's position?

MR. MC MANUS: I think the whole resolution of the motions are going to—I am going to file with the court.

THE COURT: Before the trial starts or afterwards? [9] I'm kidding you. Do you have it on file?

MR. MC MANUS: Right here.

THE COURT: Okay.

MR. MC MANUS: I was waiting to see what counsel was going to say since during the civil hearing, he kept talking about the very fact that he was going to be talking to the jury about not following the law and having sympathy for Mrs. Batey for various different reasons, biblical and otherwise. So, I've prepared a brief. He just gave me his brief about five minutes ago, and, the court on that issue and also I'd be filing one on the defense of necessity which he intended to raise in the contempt hearing. The court may be familiar basically from the Chuck Patrick case, and those are the only two, although he's told me he has a lot more. I think that's going to have a great deal to do with—in other words, if he's not allowed to bring the defense of necessity, then any question about homosexuality is irrelevant since there is no such defense.

THE COURT: I don't think so in this case—I don't know what I will allow or won't allow in the way of voir dire. But I think you'll probably find that in San Diego County, that because of the unusual nature of this, most of the prospective jurors will have heard something about this case even though—

MR. MC MANUS: That's true.

THE COURT: —they can be fair if they say so. So I think clever counsel can ask almost anything they want on voir dire, and there is almost nothing the courts can do [10] because they can use it as a basis to exercise a peremptory challenge pursuant to our supreme court decisions.

So, I would rather take the time to do the voir dire and be as liberal as possible to both sides rather than have the thing reversed and tried all over in three years from now. It just doesn't make any sense.

MR. MC MANUS: I understand, your honor, but I have submitted a brief based upon the law which is very clear in this state as to counsel's argument. And I submit that that is not the type of questioning that is allowed by any court in the state.

THE COURT: We'll see. I am just—I have the three philosophies, her religious feelings, the homosexuality and the publicity, and with regard to that, I've decided that I think I will divide voir dire, so all right.

In most cases, other than the death penalty case, I would not do it, but in this case I think it merits it.

MR. MC MANUS: I don't have any problems with individuals.

THE COURT: That's what I want to find out.

All right, insofar as use of the well in this court, if it makes sense, this court was not designed to try lawsuits and I don't know what it was designed for, so, if it makes sense to go through the well, I do not object to any of that.

So far as approaching witnesses—

MR. FARRIS: That, your honor—

THE COURT: Witnesses, again, from looking at this, if [11] you stand where lawyers usually stand, you'll block jurors number one and seven, so they can't see the witness. If you will be kind enough to come around behind them so that the jurors can always see the witnesses, I would appreciate it.

Insofar as the instructions, I require the people to submit all their general instructions and pull all their CALJIC instructions. If you have instructions, and I would like the people to do that in a reasonable period of time, then counsel, if you have special instructions, fine. I do not like argumentative instructions. The index says we don't give them so I don't. If you don't want to cover an area of law, I will certainly consider it. But I must suggest to you that instructions that are argued for either the prosecution or defense, I tend to turn them down. There are some cases that indicate that if the lawyers submit those, perhaps the court on its own is required to prepare your instructions, but only in areas where I believe there is a burden on the court do I do that. But in most cases, other areas I do not.

If you have stipulations, I would like them in this case to be written out, to be signed by both counsel, then they may be read in the record, and then they can be filed as an exhibit. I think there is nothing worse from a professional standpoint for the lawyers to say we have a stipulation and get up and read it to the jury and then have the other side say no, I don't agree with that.

What I am doing is we're having our chambers conference here on the record.

MR. FARRIS: Sure, that's fine.

[12] THE COURT: Insofar as objections are concerned, if you make legal objections, I will try to give you a legal ruling. If you make speaking objections, then you get a speaking answer, the only way the court can control that, in my opinion, is speaking rulings in which the court usually wins and both lawyers lose, or held up to ridicule and contempt.

I will allow you to go a distance, but in the last analysis, I will run this courtroom, and if I get reversed on it, that's too bad, but I will still run my courtroom. So, you figure out how you want to do it.

Insofar as exhibits are concerned, if there are any, I would like them premarked, shown to counsel so we don't have to spend a lot of time. I don't expect a lot of documentation in this case.

All right, then the next area—oh, may I also suggest to you that in picking a jury, I fill twelve seats and fill the five in front. You voir dire all seventeen at one time. Then you only challenge to the twelve in the box. And as you challenge one of those persons, in the order in which they were placed the people will take their place. Then when we get down to eleven people in the box, we'll call six more and you will voir dire all six at the same time. But the only ones you will challenge will be the six—or strike that—the twelve in the box, and this, of course, is after we go through the individual voir dire, because I want to get through just those three areas, publicity, homosexuality and—

[13] MR. FARRIS: Religion.

THE COURT: Religious aspects of it individually.

Then, the remainder of the voir dire we will do as would be in an ordinary lawsuit.

May I suggest to you that most of the cases, I can't remember my own name, so if you wish to exercise your challenge, juror number three, Mrs. Smith, if you will tell me which number, then I would be able to find it faster and I would appreciate that.

Is there anything else to discuss other than evidentiary and pretrial motions, gentlemen?

MR. FARRIS: No, your honor.

THE COURT: All right.

I have one other thing to say, and that is that I have no quarrel as to how both of you handle your division of the lawsuit except that only one lawyer will handle each witness.

MR. FARRIS: Fine.

THE COURT: In other words, if one of you chooses to cross-examine, the other one may not do it when he finishes, and one lawyer will handle the argument and both in the beginning and closing.

Any problem with that?

MR. SMITH: None at all.

MR. FARRIS: No.

THE COURT: Any problems with two lawyers working together? I find that there is, but I just lay out the ground rules before we start.

[14] I would like you to prepare for me a list, and I am going back and go through your file and your briefs and things because if you've taken the time to write them, I think I owe you an obligation to read them. If you make a list of the motions

and the order in which you want to have them heard, as soon as I read everything in the file, we'll start with the motions; is that agreeable?

MR. FARRIS: Yes.

MR. MC MANUS: Yes, your honor.

MR. SMITH: Yes, your honor.

THE COURT: So if you have anything you want filed, file it now. And I would like to dispose of all motions except for those dealing with evidentiary matters that come up during the trial, because I think there is nothing more discourteous to a jury to spend three-quarters of the trial sitting outside on the bench while the lawyers and judge in here wrangle over things that should have been done before the trial starts.

MR. FARRIS: Your honor, do you want the list of motions?

THE COURT: Handwritten is fine. I just want some kind of guideline as to a logical manner of approaching them. Because you gentlemen have lived with the lawsuit, you'll be able to tell me if you do this one, perhaps, et cetera, whereas the court may start at the wrong end of the horse, if you will.

Thank you.

MR. FARRIS: Thank you.

[15] THE COURT: Send that in at your convenience.

MR. FARRIS: We will, your honor.

(Recess.)

MR. SMITH: Your honor, may I get Mr. Farris? I think he's outside.

THE COURT: Yes, certainly, sir.

(Brief pause.)

THE COURT: One other matter that I didn't mention, and I will mention it now because it's been brought to my attention

that staff, judges, et cetera, have received a lot of correspondence with regard to this trial. Most of it is hate mail from one side or the other. I am going to put it on the record now that I tried the case where the little girl's arms were cut off and she was left to die, and I received a stack of mail about twelve inches high. I threw it all in the file and never read any of it until a year later at which time I went through it. I got letters from catholic priests, from Hong Kong, all kinds of stuff, and I want you to know that if any mail comes in this case directed to this court with the intent to affect the court's decisions, I don't intend to read it. So I am not saying that such a thing will be attempted, but I see the news media left now. I hope this won't get out I am not interested in such mail, and I am not talking to counsel, because I don't expect you to have anything to do with it. But be that as it may, you may read it but I don't intend to read any of it.

First motion you indicated that you would like to have heard is the motion to dismiss on the grounds of double [16] jeopardy, and I read the brief filed by the defndant's counsel in this matter. The people have not filed a response.

MR. MC MANUS: Your honor, I was given a copy of this brief at 9:40 this morning, and counsel on Friday in another hearing in another department indicated there was such a brief but wouldn't give me a copy. So, I just got it this morning when I finally asked for it. He wouldn't give it to me until we walked in the door, for whatever reason.

THE COURT: I gather from, again, from just reading the newspaper from the judge who heard the domestic refused to make a decision. So, I don't assume this is news to you that they intended to raise it.

MR. MC MANUS: Not at all.

MR. FARRIS: He knew for a few weeks.

MR. MC MANUS: I've known for months.

THE COURT: Do you have anything you have to say?

MR. MC MANUS: Yes, your honor.

THE COURT: That, I gather, is a real issue.

MR. MC MANUS: All I'm prepared to say is in what's in this—how many page brief? Eleven-page brief.

THE COURT: When will you be—

MR. MC MANUS: To—

THE COURT: When will you be prepared? That's the first motion.

MR. MC MANUS: Maybe an hour and a half or so.

THE COURT: Fine.

MR. MC MANUS: I can cite—well, he cited as to the cases I have already researched and have rough notes, that's [17] People vs. Barry.

THE COURT: He cited 65—in essence, he set forth what he anticipates your defense to be in here.

MR. MC MANUS: That's right; that is correct.

THE COURT: He cites first of all—

MR. MC MANUS: In one way—

THE COURT: Do you concede that both defenses contain the same element and supported by the same elements? He makes that contention on page 10.

MR. MC MANUS: No.

THE COURT: Then I want to know what the difference is there at 2:00 o'clock this afternoon.

And on page 8, he sets forth that you'll probablly rely on penal code section 657 and two cases. And I read the penal code section, but I haven't had a chance to shephardize it, but it's in the '84 code, so I assume it's been—all it says is 1872, I think.

MR. MC MANUS: The court is going to find two cases, that's California Supreme Court case, in re Morris—

MR. FARRIS: Your honor, I think they're all in our brief.

THE COURT: Let me see which ones you gentlemen feel—in re Morris?

MR. MC MANUS: 194 Cal at 63.

THE COURT: All right.

MR. MC MANUS: The other one is—the second one is People vs. Barry, B-A-R-R-Y, at 153 Cal App 2d, it looks like 192.

[18] MR. FARRIS: 193.

MR. MC MANUS: I can't read my writing.

And the third one is he relies on People vs. Lombardo, 50 Cal App 3d, 849.

THE COURT: Have you—

MR. MC MANUS: That's the law up until I got his brief. Now, I don't know what this lower federal court case says that he cited and a couple of these other cases I haven't had a chance to read. I don't know anything about them.

THE COURT: You would like until 2:00 o'clock to read his brief and be prepared to respond?

MR. MC MANUS: That's fine.

THE COURT: All right.

MR. MC MANUS: Why don't we talk about the other motions so if we need to prepare on all of them we can do it all at once and get this on the road.

THE COURT: Let me ask you, if, depending on what I rule, if I rule in favor of the people, do you wish to proceed about the trial or try and seek a writ in the district court of appeals? It would appear to me that this question should be decided before a trial in this case, although it's not a long case, it's still the kind of a case I think this thing ought to be decided.

MR. FARRIS: Your honor, we had anticipated asking for a continuance of the trial so that we could seek a writ. We weren't

sure whether we would get it or not. It's on a frivolous legal matter at minimum.

THE COURT: I don't consider this to be a frivolous—

[19] MR. MC MANUS: I think it's determinative. If he doesn't have a defense, he doesn't have a whole lot.

THE COURT: I won't comment on that, but I think two things—

MR. MC MANUS: Well, that's—

THE COURT: You ought to have a chance to take a shot at it in the State of California, and also you ought to have a shot in the federal court. You're contending even if California takes this position, California is wrong and it's a federal question under the Fifth Amendment. And I think without undue delay that should be disposed of prior to the trial of the matter.

MR. FARRIS: My feeling too, your honor.

MR. MC MANUS: Well, I would urge that we follow the normal procedure.

THE COURT: What is the normal procedure? Just ignore the motions?

MR. MC MANUS: No, that he apply to the court of appeal if he wants to seek appellate relief, and they either state a trial or they don't.

THE COURT: Well, that's what I assume he would do. But the question is would I give him a continuance for a period of time to seek such a stay, and my feeling would be that I would probably give, if I rule against him—I'm not saying I would, but if I rule against him—I might give him until next Monday to see whether the appellate court would want to stay the matter. That's sufficient time to get through them. And if I rule against you, you have all the time [20] you want because there won't be any trial unless I'm reversed, right?

MR. MC MANUS: Well, I don't know about that. Just that one issue. Sure, it will be a real long trial.

THE COURT: If I rule against you, the double jeopardy does apply—

MR. MC MANUS: Oh, I thought we were talking about double necessity.

THE COURT: No, if I rule against you on double jeopardy, they prevail and then you have a right to seek your remedy against me; is that correct?

MR. MC MANUS: Yes, that is correct.

THE COURT: I just want to find out that in the area of double jeopardy, do the people have a right to appeal? I haven't had one of these in a long time.

MR. MC MANUS: I think we have a right to appeal, but I think—

MR. SMITH: The Lombardo case is right on point. I think that's what they did, the D.A. appealed.

THE COURT: In other words, my ruling is not final in the event that I'm wrong is what I'm trying to get at.

MR. FARRIS: That is right.

MR. MC MANUS: That is right.

THE COURT: And the people have a remedy by appeal just like the defense?

MR. MC MANUS: Somehow I got—I'm sure we changed from the defense of necessity to double jeopardy.

THE COURT: I never got to the necessity yet. I am [21] talking about double jeopardy, that's all.

MR. MC MANUS: All right.

THE COURT: Are you prepared to proceed on double jeopardy now or did you want until 2:00 o'clock this afternoon?

MR. MC MANUS: Well, the problem is I have just seen this stuff, so I would like until 2:00 o'clock.

THE COURT: Okay.

MR. MC MANUS: And he's filed two briefs this morning, and I've just had a chance to see one of them.

THE COURT: Let's get this cleared up then. It says your honor, we also desire to amend our pleadings to add the additional plea of former jeopardy and former conviction.

MR. FARRIS: Yes, your honor.

THE COURT: California statute provides for pleas on the alternative not guilty, not guilty by reason of former conviction, guilty by reason of former jeopardy, and we would like to enter all those pleas in the event that the trial does go forward.

If I rule there is no jeopardy, can you enter the plea but not put on any evidence because I rule on it in essence, haven't I?

MR. FARRIS: No, you ruled on it as to the different amendment grounds. The statutes in question indicate that it's a triable issue of fact whether or not a defendant has been in former issue and former conviction.

THE COURT: You haven't filed any briefs, so I would like to see what you have on that at 2:00 o'clock.

[22] and with all due respect, I don't require you to file 48 pages from Cal Jur 3rd to increase their per diem. I just want the issue that really deals with the issue and I will read it and give you the best decision I can.

MR. FARRIS: We're just relying on the statutes, your honor.

THE COURT: Well, give me those and any cases that are in them, and I will read those cases. The D.A. will have until 2:00 o'clock.

Then, the question of limitations of the defense of necessity.

I would say to counsel that for your planning, as he says, Mr. McManus' trial brief on the issue of jury notes that on occasion, the defendant has contended that during voir dire counsel

should be able to tell potential jurors that they may disregard the law and the court's instructions and find the defendant not guilty based upon sympathy; is that your intent?

MR. FARRIS: No, your honor.

THE COURT: Then I don't have to rule on it, because I will tell you that I will stop that. You will, as he correctly points out, if we're going to have a system, we've got to have some system or everyone is bound by the same rules otherwise we have anarchy. So, I'm not faced with this problem.

MR. MC MANUS: He told me he was going to file a motion.

MR. FARRIS: Mr. McManus was close to being correct, [23] but not exactly correct, and it was not our intent to do that.

Basically we wanted him to be prohibited from telling the jurors that they must obey, and they must accept the law from the court. They are not under any requirements. Jurors have a power to disrgard the evidence, disregard the evidence if they choose to, but there can be no instruction given on that, nor can any argument be made on that. That's just been the province and the power of the jury.

MR. MC MANUS: Well, I am not aware of that.

THE COURT: How are you going to argue it?

MR. FARRIS: We're not. We're trying to prevent him from saying that the jurors must accept the law of the court as is given. That's the limitation.

MR. MC MANUS: Well, I certainly anticipate arguing CALJIC instructions on that issue.

THE COURT: I have to tell the jury that they have to accept the law from me and in essence follow the law whether they agree with it or not.

MR. MC MANUS: That is right.

THE COURT: That's what I do. I took an oath when I put on the robe, and with all due respect to certain courts that are

above me, I don't necessarily agree with some of the decisions but I am not privy for other reasons, and I don't live in other parts of the state. But I follow them if I know what they are, whether I like it or not, because that's what I agreed to do, and I tell my jurors the same thing, whether they like it or not, really the function of a jury is an intellectual exercise. They have to determine what the facts [24] are. Once they determine what the facts are, they apply the facts to the law and they reach a just conclusion.

MR. FARRIS: That's right.

THE COURT: They choose on their own, and they sometimes do for sympathy or other reasons to disregard it, they are the conscience of the community, and I have no control over that. Usually that's attributable to good jury picking by one side or the other. But I am required to make the statement, and I think you can argue it. And I don't think you can argue to the contrary. But what you can do by innuendo is really up to you.

MR. FARRIS: Your honor, I think what you've said so far that they must accept the law and follow the law, we would raise no objection to that. That they must obey the law, I think that goes beyond what the instruction would say. And there is no requirement. They are not required to obey the law. They have an oath that they take and they will, but there is no legal requirement that they actually obey it.

THE COURT: Let me see what the oath is that the jurors take.

Do you have it written down someplace? I never listen to it.

(Clerk proffering oath to the court.)

THE COURT: "Oath to jury to try case: You and each of you do solemnly swear that you will well and truly try the cause now pending before this court and a true verdict render according to the evidence, so help you God?"

MR. MC MANUS: It's in CALJIC, your honor, I think it's [25] 100 or 101.

(Court proffering document of oath back to clerk.)

THE COURT: Let me go get my CALJIC.

(Brief pause in proceedings.)

MR. MC MANUS: Caljic 100, your honor.

THE COURT: Yes, that's a good starting place, that's the first one, right? And it states: "As jurors, you have two duties to perform. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source." So that tells them where to get the facts.

Going down, "your other duty is to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict."

I would interpet that to say that they are required to follow the law as I give it to them.

MR. FARRIS: That's our interpretation too, your honor. I think maybe it's a semantical difference.

THE COURT: It is, because I don't understand what the problem is now.

MR. FARRIS: There is none. As long as Mr. McManus, that they accept and follow the rules of law. If he limits himself to those kinds of arguments—

THE COURT: Mr. McManus, you can argue the rules of CALJIC.

MR. MC MANUS: That's what I put in my brief, what he just said exactly what it says.

THE COURT: Fine. I don't see the problem. It seems to have resolved itself.

[26] MR. MC MANUS: All right.

THE COURT: All right.

I gather then that takes us back to the primary question, and that is double jeopardy and which I will allow the district

attorney to have until 2:00 o'clock. It's only ten minutes of 11:00 anyway.

Is that agreeable?

MR. FARRIS: That's agreeable.

MR. MC MANUS: That's fine. We still haven't discussed the defense then of necessity.

THE COURT: All right.

Let me suggest this to you also, that in the future, now that you are here for trial, I don't want any gameplaying with regard to the motions where everybody walks in and files it and doesn't give it to the other side until the last minute. The end result, again as I say, is that they jury sits outside for four or five days swearing at me, my ancestry and the whole system. If you are going to file motions, file them. You gentlemen are all competent. File them as soon as possible and let's get them resolved one way or the other.

All right. And I'm not inferring there was anything wrong. I am just making a statement. I just prefer that in my court.

The question of necessity, the defense of necessity.

MR. MC MANUS: Yes. Counsel has alleged now that I've just briefly read, he's alleged certain, what do you call it, I think offers of proof.

THE COURT: Isn't it preliminary form to rule on it [27] at all until after I've heard the evidence presented?

MR. FARRIS: Yes, your honor.

MR. MC MANUS: Well, except that I clearly want that before the jury, I mean, before the jury is picked. Otherwise—

THE COURT: How am I going to know?

MR. MC MANUS: Well, he makes an offer of proof. We already have under oath her sworn testimony on this very issue where she—they tried this defense in the criminal contempt

hearing. It was a finding that they had not established any of the elements of the necessity. She, Mrs. Batey, is under oath, and I have transcripts of that. And I point out even the page numbers in the transcript which I will submit to the court. But as far as having the issue of necessity tried before the jury and then tell them to disregard what they've already heard, well, what are we doing here? Then he gets a defense of necessity.

THE COURT: Well, again—

MR. MC MANUS: She has—

THE COURT: Again, if the jury does what I tell them, even if he—his evidence falls short, he then has had the opportunity to present his evidence in this case to make a complete record, and I have to presume that the jury will do what I tell them, which is to follow the law.

MR. MC MANUS: Well, I think we all know the realities that you don't unring the bell that's been rung. And I think the appropriate—

THE COURT: Does that apply to the defense as well as the prosecution?

[28] MR. MC MANUS: Probably so. I think the appropriate procedure for counsel is that somehow this testimony is going to be vastly different than it was before, that he put on witnesses and present it but not in front of the—before the jury, because it changes the whole tenor of the case if he's allowed to get in the defense of necessity. That changes my strategy, that changes everything.

MR. FARRIS: All I can say, your honor, is the prior court was sitting as a trier of fact. Triers of fact can reach different conclusions on the same evidence, and Mr. McManus doesn't have a right to prevent us from presenting evidence and it won't be exactly the same but it will be substantially the same as in the prior proceeding.

The primary would be the difference of Brian Batey, and simply the jury can come to a different conclusion than Judge McConnell can in applying the facts, the facts of the law rather.

MR. MC MANUS: Well, it's not a jury question whether or not the defense of legal necessity applies. The Patrick case sets it up hearing it out of the presence of the jury whether you've established it, et ecetera.

In other words, to allow him to put on the defense and let the jury hear everything, and, oh, well, golly, we won't have that defense, I think is what it comes to. That's giving them two bites out of the apple.

Granted, the court may come to a different opinion after hearing the evidence, but it's the court's duty to determine whether it applies. There is no authority anywhere [29] that it's the jury's duty to determine if you can present the defense of necessity.

MR. FARRIS: You think, I think we may be arguing something over that's unnecessary because in addition to the relevancy of the evidence on the defense of necessity, it's also evidence that's relevant to the criminal intent that's required in this case. There is no allegation that she did what she did willfully, with intent to deprive the legal custodian of the child, the right to have the child.

In the case of People vs. Hyatt, 18 Cal App 3rd 618, the court held that the defendant who took a child in a child-stealing case under 278, the evidence showing the reasons why the defendant took the children was admissible on the issue of intent.

And—

THE COURT: Is this—

MR. FARRIS: That is a 278.5 prosecution.

The only difference is what kind of intent is required in that case, it's malicious intent. In this case, it's the intent to deprive. And, so her reasons for taking the child and the child—we're essentially only going to call two witnesses, Mrs. Batey and the child. And they will testify as to the reasons that Mrs. Batey took the child. It's relevant on the issue of willfulness and the element of the intent to deprive the legal custodian. It was that

her intent, what was she doing? Why did she do it? And, so the testimony about why she took the child is relevant and not only for the defense of necessity, but also in the intent and [30] willfulness.

THE COURT: First of all, can you tell me where in the Patrick case, I just read it for what it says, it says that you should have this hearing.

MR. MC MANUS: Well, it starts where it says there may not even be such a defense, but if there is—

THE COURT: Give me the page.

MR. MC MANUS: What is it, and I think it starts at about 960 where they start talking about it.

(Brief pause.)

THE COURT: I will want an offer of proof of exactly what evidence would be offered by the defense if you intend to request instructions on necessity. And I would like that at 2:00 o'clock after I rule on the other motions so I can rule on it. It seems that this case does rely on the offer of proof and that's a cleaner way to do it.

I am not foregoing the other aspects of it, which is that you may be able to get it even if I rule against you on the other prong of your attack, which is to do away with the intent requirement of the code section.

MR. FARRIS: Your honor, I would then ask if—we filed in our memorandum on the defense of necessity points and authorities under the defense section statement of facts. We have set forth nine specific items, which would be our—which we have offered as we stated in there as an offer of proof under People vs. Patrick. That's our understanding of the proper procedure that would make an offer of proof.

THE COURT: The statement of facts then that you filed [31] on January 14 were points and authorities re defense of necessity is what you wish to offer?

MR. FARRIS: If more specificity in any particular, we would be glad to do that, but we know that's sufficient to get us past the Patrick requirement.

THE COURT: This is what you plan, on which the basis, I will rule.

MR. FARRIS: Right.

THE COURT: All right.

MR. MC MANUS: Your honor, I have a transcript of the testimony before that contradicts almost everything that is in there.

THE COURT: Well, then, I gather that you would impeach her with it and that the trier of fact would be entitled to weigh both of them to make a determination if this is the truth if she so testified at this time, right? But it they indicate that on their direct that this is what they are going to offer, then I would expect this and I will not weigh the evidence, if you understand what I'm saying. I don't think my job is, as a trier of fact, to weigh their offer. All I can do is assume as an officer of the court this is what they tell me this is what they're going to present. And in looking at that, would that constitute a possible defense of necessity under the laws as they now exist. That's as far as I am entitled to go.

And then, the other question would be one for the trier of fact.

Anything further? [32] 2:00 o'clock. Thank you.

I gather your client is on bail pending all proceedings:

MR. SMITH: O.R.

THE COURT: She will remain O.R. through those proceedings.

MR. FARRIS: Thank you, your honor.

(Whereupon, the noon recess was held at this time.)

[33] SAN DIEGO, CALIFORNIA, MONDAY, JANUARY 14, 1985, 2:00 P.M.

THE COURT: Before we proceed, It's my understanding that the TV media has asked permission to cover—do you have that order?

THE CLERK: Yes, your honor.

THE COURT: —To cover these proceedings, not, of course, the selection of the jury but the motions, and I indicated to my clerk that they should check with both counsel to see if there were objections, and I would hear you before I would allow the cameras into the courtroom.

Counsel for Mrs. Batey?

MR. FARRIS: No objection.

MR. MC MANUS: No objection for purposes of the motions.

THE COURT: I would certainly not allow them to be present during the picking of the jury, because I think that's excluded.

All right. I've signed that order and it will be filed.

Does the defense have anything further on their motion to dismiss?

MR. FARRIS: As to double jeopardy? No, we would not have anything further. We would have rebuttal argument.

THE COURT: Well, let me indicate that I have been informed that the people, for one reason or another, don't have anything in writing, but they certainly at this time have an opportunity to be heard.

[34] MR. MC MANUS: No, I don't have the luxury of someone sitting there with a typewriter, so I have to do it myself.

I submit to the court that the code is very clear on the issue and there wouldn't be any meaning to the code section, what is

it, 657, if a person could be held in contempt for violating a court order and then not prosecuted for violating a certain statute.

I submit that the gravamen of the two offenses are very different. One has, as even Mr. Farris points out in his points and authorities, a violation of the court's order of the court having the opportunity or the necessity to be able to dictate to people before the court as to how they should act. And I would agree with counsel's characterization of that as criminal contempt because the sanction, when someone has violated a court's order is a criminal sanction of five days or a thousand dollars for that violation. It's not the type of contempt where you say bring in the things and they don't—in other words, the idea of getting somebody to do something, testify when they have immunity, which is a civil contempt, I believe, so it's a criminal contempt; I agree with that.

657 would be meaningless, and it's been in the code since 18—I think '72, and the cases thereon, I think, are pretty clear. The cases that I cited to the court in my points and authorities and reiterate again, that is in re Morris, a California supreme court case, which has never been overruled in spite of what counsel says that some appellate court did do it, it wasn't overruled by the case he cited.

[35] People vs. Barry, which is a relatively new case interpretating this section and, of course, the very gravamen of the distinction, and that is, one is a violation of the court's order, it is the contempt, and the other is a violation against the people of the state of California, that is the penal code.

Now, to say that you can mitigate the sentence of a criminal prosecution and conviction by use of the, whatever sentence there is on the contempt proceedings for the same thing would be ridiculous if in fact that were jeopardy.

Now, counsel cites a case in his authorities, I forgot anyway, I think it's Lombardo, People vs. Lombardo, 50 Cal App 3d 849, I have no quarrel with that case at all because in that case

the criminal statute involved was criminal contempt, penal code section 166. Of course, that's exactly the same thing. That is the same thing. It wasn't a violation of some statute involving other things, it was contempt on one side and contempt on the other side.

So it's very, very different factually than any of the other cases. And it goes on to distinguish the other cases for that very reason because in that case they cited a person for contempt and then they charged for contempt for exactly the same thing. In other words, they found him guilty of a criminal contempt, and then they found him guilty of criminal contempt. That's not what we have here.

THE COURT: Anything further?

MR. MC MANUS: Well, on that very limited—he's brought up a number of other things, getting in the same [36] thing by using some guise of intent and/or the alleged plea of former jeopardy or double jeopardy, but I'll—did you want me to address those issues now also?

THE COURT: I, at this point, only want to hear on the motion for dismissal for double jeopardy.

MR. MC MANUS: Thank you.

MR. FARRIS: Your honor, the gist of Mr. McManus' argument is easily met. He has said that in effect, the elements of the two offenses are different. And we would submit that the elements of the offenses are not different. The analogy from the case of Lombardo is exactly on point. In this case, Mrs. Batey was charged with contempt for violating a custody decree. The title of the CALJIC jury instruction on this penal code is childstealing, dash, violation of the custody decree. The elements of the crime include that such act was in violation of a custody decree relating to such child, that's element number two. The clear parallel is there. Mrs. Batey is charged with violating the court order in the contempt matter. She's charged with violating the court order in this matter. They're exactly the same thing. The elements are no way different whatsoever.

The elements, number one, that a person took or retained after the expiration of the visitation period or concealed the child from his legal guardian and, two, that such act was in violation of the custody decree relating to such child.

Mrs. Batey was charged with taking and retaining and concealing Brian just as in the contempt matter, just as she is charged with that here. She was charged that that was [37] a violation of the decree. That is what contempt is. Contempt is violation of the court order. This is a particular kind of court order, that is, a custody decree. Mrs. Batey has—has been found guilty on one hand, and she's being charged again with the same thing, violating the custody decree.

Mr. Batey, the complaining witness in this case and the petitioner in the contempt matter, essentialy has made his election. He chose to—he chose to go forward first on the contempt matter. It's not Mr. McManus' fault. It is simply an election made by Mr. Batey even though he is the complaining witness and prosecutor in the other thing. We have in effect already tried this lady. She's been found guilty. Jeopardy has attached. The points and authorities that we have raised are absolutely crystal clear. Mr. McManus has not raised anything to the contrary. He's admitted the most important argument we think and that is it's a criminal contempt. He is exactly right, and he is also right that 657 would be meaningless, that is true. In fact, the Fifth Amendment has overruled 657 where there is a Fifth Amendment jeopardy provision, 657 goes out the window because the California statute simply cannot override a federal constitutional provision, and in effect, the—where the Fifth Amendment speaks, 657 must remain silent. So, Mr. McManus has certainly not answered the points of our brief. He's conceded the most important one, and this is clearly that Mrs. Batey has been charged with violating the court order in both matters, that's the gravamen of the complaint. And [38] it is clearly double jeopardy.

MR. MC MANUS: May I just respond briefly?

THE COURT: Oh, certainly. I want everybody to have every opportunity to be heard.

MR. MC MANUS: I submit that counsel has presented now no cases and no authority for his proposition.

I might, in a theoretical sense, tend to lean a little bit more in his favor if the facts were as he has stated them, that is, if Mrs. Batey had been found guilty of criminal contempt, and then in this proceeding, under 1564 of the penal code where it says "willful disobedience." He might arguably, I submit, have some authority to argue under the Lombardo case but if that were what is charged here, he would have a leg to stand on. But I submit in view of the supreme court case going way back to, I think it's 1924, that is the law.

THE COURT: Matter submitted?

MR. FARRIS: Yes, your honor.

MR. MC MANUS: Yes, your honor.

THE COURT: It appears to the court from an examination of the pleadings that the charges in count one and two in effect contain elements that are the exact same thing as required in the contempt. In other words, you have to have a valid court order. You have to have violation of that court order. You have to have noncompliance with the order, and then noncompliance has to be willful. In the charges, you have to have a valid order. I assume you would have to have knowledge of the order by the way it's drafted. You have to have [39] noncompliance and, in essence, it has to be willfull, i.e., the intent to deprive another person of his rights to physical custody and visitation, which in effect is what the order is so, I believe the element of the two are identical.

The contempt is punitive in nature. The people concede that, and I agree with them. I'm satisfied that it was not done as you so correctly point out where you put a witness in jail until they answer or until they bring back the furniture or whatever, but in fact this was, as they point out after she had turned herself

in. So, the only purpose in this contempt could be punitive, so, that's there. And the evidence is the same.

So, the evidence would be the same under both. So, having that, then we come to the question, would that be double jeopardy? I don't know whether it would be or not under the laws of the state of California, but I am required not only to enforce the laws of the United States of America and as they point out, which is the only case on it that we have been able to find, in *People* v. *Lombardo*, which is an August of 1975 case where they do point out in a footnote that they are aware of the Morris case and the other cases. They don't have the authority to overrule them but they say in spite of that, we're going to make this ruling even in light of Morris, which I've read in the Barry case. I think Lombardo says on page 854, "that's where it is here, the court order was punitive in nature, and the elements of both offenses are the same, and the same evidence apply to [40] both offenses and we conclude that the prosecution . . ." Then I won't state the section because it's not applicable, "was barred by double jeopardy includes the Fifth Amendment of the United States Constitution." And I believe that is the correct ruling at this time in the case, and your motion is granted.

I think the prosecution is barred by the Fifth Amendment of the United States Constitution as made applicable to this state by the appropriate amendment.

MR. FARRIS: Thank you, your honor.

THE COURT: Motion is granted.

MR. MC MANUS: Thank you, your honor.

THE COURT: Thank you, gentlemen.

She's on O.R., I don't know, that's it, I guess.

MR. FARRIS: That's it.

THE COURT: Thank you.

MR. MC MANUS: Thank you, your honor.

THE COURT: Court is in recess.

(Whereupon, the proceedings in this matter on this date were concluded.)

State Of California)
: SS.
County Of San Diego)

I, Patricia L. Friend, an official reporter of the Superior Court of the State of California, in and for the County of San Diego, do hereby certify:

That as such reporter, I reported in shorthand the proceedings had in the above-entitled cause on January 14, 1985; and the above and foregoing transcript, consisting of pages numbered from 1 through 40, inclusive, is a true and correct transcript of the proceedings had in said cause on said date.

Dated at San Diego, California, this 10th day of Sept., 1985.

/s/_____
Patricia R. Friend, CSR No. 2494
Official Reporter